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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC-98-149-51479 Office: Vermont Service Center Date: 11 JAN 2002

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER: [redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be dismissed.

The petitioner is engaged primarily in marketing fabrics designed and manufactured by its parent company. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its vice president/marketing manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity. The Associate Commissioner for Examinations affirmed the director's decision.

On motion, counsel submits additional evidence to address the grounds of the director's denial and the findings of the Associate Commissioner. Counsel for the petitioner states reasons for reconsideration, but counsel does not furnish any new facts to be provided in the reopened proceeding.

8 CFR 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

For comparison purposes, when used in the context of other legal disciplines, the phrase "new facts" or "new evidence" has been determined to be evidence that was previously unavailable and could not have been discovered during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, the regulations at 8 CFR 3.2 state:

> A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. . . . A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and *was not available and could not have been discovered or presented at the former hearing* . . . ." (emphasis added.)

In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992); INS v. Abudu, 485 U.S. 94, 100 (1988); see also Matter of Coelho, 20 I&N Dec. 464, 472 n.4

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[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

(BIA 1992). Accordingly, in federal criminal proceedings, a motion for a new trial based on newly discovered evidence "'may not be granted unless . . . the facts discovered are of such nature that they will probably change the result if a new trial is granted, . . . *they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier*, and . . . they are not merely cumulative or impeaching.'" Matter of Coelho, 20 I&N Dec. at 472 n.4 (quoting Taylor v. Illinois, 484 U.S. 400, 414 n.18 (1988))(emphasis added).

On motion, counsel for the petitioner has submitted a letter, dated September 14, 1999, from the Import Manager of AEI Customs Brokerage House. The manager states in pertinent part that the beneficiary is the only authorized person at Basictex with which they conduct business, that the beneficiary provides information on what kind of shipment is involved, decides the method of shipment, approves expenses involved and that she periodically visits AEI Customs Brokerage House as the representative of Basictex. During such a visit, she "personally checks over the work being done on her company's behalf, she then oversees our supervisor on the work." On motion, counsel asserts that the record is not closed to facts from the date of the filing of the petition to the date of the final decision, the Service erred in considering evidence of beneficiary's wages submitted initially and not considering the amended documentation submitted on appeal, that the Service erred in not concluding that the beneficiary's position was managerial or executive and, that the beneficiary also oversees a "U.S. Company staff".

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 CFR 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. It is further noted that the petitioner has submitted evidence with this motion that fails to address the reason(s) for denial by both the director and the Associate Commissioner for Examinations. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

Further, counsel has submitted no evidence sufficient to support his conclusion that the previous decisions were based on an incorrect application of law or Service policy.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. at 323 (citing INS v. Abudu, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, 485 U.S. at 110. With the current motion, the petitioner has not met that burden. The motion to reopen will be dismissed.

Finally, it should be noted for the record that, unless the Service directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 CFR 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. 8 CFR 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the Associate Commissioner will not bedisturbed..

ORDER: The motion is dismissed.